Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

SUMMARY OF ARGUMENT

In these cases, the state legislatures of North Carolina and Maryland drew congressional district lines to subordinate voters of a particular political party, dilute their votes, and entrench in power the party controlling the legislature. In North Carolina, the state legislature drew a map that sought to maximize the election of Republican candidates because, as Representative David Lewis explained, "electing Republicans is better than electing Democrats. So I drew this map to foster what I think is better for the country." Rucho J.A. 460. To that end, the mapmakers packed and cracked Democratic voters, seeking to ensure that Republican would wield political power far exceeding their share of votes cast at the polls. In Maryland, the state legislature redrew the 6th Congressional District

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

to flip the district from Republican to Democratic. To achieve this end, the mapmakers shuffled hundreds of thousands of citizens out of or into the 6th District, using sophisticated political data to dilute the votes of Republican voters.

This sort of partisan gerrymandering is "'incompatible with democratic principles'" deeply rooted in the Constitution's text and history. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)). The maps drawn in these cases violate "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Id.* at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)). A state legislature's drawing of lines to "subordinate adherents of one political party," *id.* at 2658, and to burden disfavored voters' "'representational rights,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)), cannot be squared with the First and Fourteenth Amendments. Under our constitutional scheme, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

When our Constitution's Framers wrote our national charter more than two centuries ago, they recognized that "the true principle of a republic is, that the people should choose whom they please to govern them." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 1836) [hereinafter "*Elliot's Debates*"]. The Framers were also deeply suspicious of partisan manipulation of the electoral process. They knew that "those who have power in their hands will not give it

up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." 1 *The Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., 1911) [hereinafter *Records of the Federal Convention*]. Aware of the dangers of faction, they wrote into the Constitution's text and structure protections against partisan gerrymandering and other similar abuses in federal elections. Concerns about partisan efforts to manipulate the rules of our democracy are thus as old as the Constitution itself.

In 1789, the Framers added the First Amendment to the Constitution, ensuring protection of "[t]he special structural role of freedom of speech in a representative democracy." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 25 (1998). The First Amendment serves as a critical safeguard of democratic self-governance, ensuring that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 576. Governmental efforts to subject "a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), cannot be squared with the freedom of speech and association the Constitution guarantees to all. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

The Rucho Appellants argue that the only check on partisan gerrymandering is congressional action under the Elections Clause, *see* Br. of Appellants Rucho, et al. 31-37, but that ignores the changes that

"We the People" have made to the Constitution over time to ensure that states respect the fundamental guarantees of liberty and equality, including in state regulation of the electoral process.

The eighteenth-century Constitution contained few direct limits on the states, but, in the wake of a bloody Civil War fought over slavery, the American people fundamentally altered our federal system, adding to the Constitution universal guarantees of substantive fundamental rights and equal protection of the laws, and, in later amendments, protections for the right of citizens to vote—a right that this Court has recognized is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *McCutcheon*, 572 U.S. at 191 ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). Significantly, these amendments prohibit more than outright denials of the right to vote, because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Efforts by the government to subordinate disfavored persons on account of their political affiliation—such as by diluting their votes—cannot be squared with either the fundamental guarantee of freedom of speech or the Fourteenth Amendment's universal guarantee of the equal protection of the laws. As this Court has many times held, states cannot regulate the electoral process in a manner that runs roughshod over the fundamental protections for speech and equal protection. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 754; *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988); *Anderson v. Celebrezze*, 460 U.S. 780,

786-88, 792-94 (1983); *Bullock v. Carter*, 405 U.S. 134, 141 (1972); *Reynolds*, 377 U.S. at 566-68.

When the Framers of the Fourteenth Amendment wrote the equal protection guarantee, they were particularly concerned about Southern states' efforts to deny equal rights to citizens associated with the Republican party, which had supported the Union during the Civil War. "The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). It protects individuals who choose to associate with a political party from state-sponsored discrimination "because of their 'political association,' 'participation in the electoral process,' 'voting history,' or 'expression of political views.'" *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment)).

Thus, both the Constitution's text and history and this Court's cases point to the same conclusion: the Constitution firmly limits the authority of state legislatures to draw lines that systematically subordinate persons associated with one political party and dilute their voting strength, not for any legitimate government purpose, but simply to entrench the governing political party in power. States may not place such unequal burdens on a group of voters' opportunities to elect their representatives simply because of the party with which those voters associate. That is viewpoint discrimination pure and simple. Such gerrymandering perverts our Constitution's democratic principles, changing the relationship between the people and their elected representatives. It "enables politicians to entrench themselves in power against the people's will." *Id.* at 1935.

In our constitutional system, when the government abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. It is precisely in cases, such as this one, where our nation's democracy is on the line that judicial redress is most urgent and necessary. *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) (observing that, in the case of partisan gerrymanders, "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms"); *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring in the judgment) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); *Reynolds*, 377 U.S. at 566 ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection . . . .")

Persons subjected to an abridgement of their First and Fourteenth Amendment rights by an extreme partisan gerrymander should not be denied a remedy simply because redistricting is inevitably a political process. In our constitutional system, legislative majorities cannot use their broad powers to draw district lines to nullify the essential premises of our system of self-government. Because the partisan gerrymanders in these cases subordinate adherents of one political party, burden their representational rights, and dilute and degrade their right to vote, the judgments below should be affirmed.

ARGUMENT

I. At the Framing, the Constitution Established a System of Government in Which the People Choose Their Elected Representatives, Not the Other Way Around.

More than two centuries ago, "We the People . . . ordain[ed] and establish[ed]" the Constitution, *see* U.S. Const. pmbl., creating a system of government organized around the idea that "the true principle of a republic is, that the people should choose whom they please to govern them," 2 *Elliot's Debates* at 257. As the opening words of the first of the Federalist Papers stress, the Constitution was itself an act of popular sovereignty and self-government. *The Federalist No. 1*, at 1 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1999) ("[Y]ou are called upon to deliberate on a new Constitution for the United States of America.").

At a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers designed a new system of government "where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people," 4 *Elliot's Debates* at 331; *see The Federalist No. 14*, *supra*, at 68 (James Madison) ("[E]ven in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular and founded, at the same time, wholly on that principle."). In the republican system of government created by the Framers, "the representatives of the people" could never be "superior to the people themselves." *Id. No. 78*, at 435 (Alexander Hamilton).

Ensuring fair and effective representation for all had deep roots in America's bid for independence from

England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that embodied the principle that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25; Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 170 (1998 ed.) (observing that of all "electoral safeguards for the representational system" none "was as important to Americans as equality of representation"). The Framers appreciated that the "genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *The Federalist No. 37*, *supra*, at 195 (James Madison).

These fundamental republican principles are amply reflected in the Constitution's text and structure. In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *Elliot's Debates* at 21, the Constitution provides that "the House of Representatives shall be composed of Members chosen every second Year by the People of

the several States." U.S. Const. art. I, § 2, cl. 1. Thus, while the Senate was designed to represent the states, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," serving as "the most exact transcript of the whole Society," 1 *Records of the Federal Convention* at 48, 132. To ensure rights of fair and effective representation, the Constitution allocates representatives to the states "according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3, reflecting that "'every individual of the community at large has an equal right to the protection of government,'" *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (quoting 1 *Records of the Federal Convention* at 473).

The Constitution also establishes explicit rules concerning the right to vote in federal elections and to run for Congress, recognizing that "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 *Records of the Federal Convention* at 250. Because the "definition of the right of suffrage is very justly regarded as a fundamental article of republican government," *The Federalist No. 52*, *supra*, at 294 (James Madison), the Framers provided that "[t]he electors are to be the great body of the people of the United States," *id. No. 57*, at 319 (James Madison), and incorporated state suffrage rules to broadly protect the right to vote in federal elections, *id.* ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.").

Along similar lines, the Constitution establishes minimal qualification for candidates for federal office. *Id.* ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."). Indeed, reflecting their concern about partisan manipulation of the electoral process, the Framers recognized that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of (a weaker) faction." 2 *Records of the Federal Convention* at 250.

The Constitution also confers specific powers on the federal government to ensure the integrity of the system of government established by the Constitution. The Guarantee Clause empowers the "United States" to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, protecting the Constitution's system of government from "aristocratic or monarchical innovation," *The Federalist No. 43*, *supra*, at 242 (James Madison). Even more on point, the Elections Clause of Article I, Section 4 gives Congress the power to override state regulation of the time, place, and manner of federal elections, a reflection of the Framers' "distrust of the States regarding elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 n.21 (1995). As history shows, this grant of power was "a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672; *see Vieth*, 541 U.S. at 275 (discussing the Framers' conclusion that "Congress must be

given the power to check partisan manipulation of the election process by the States").

During the debates over the Elections Clause at the Constitutional Convention, James Madison argued that a limit on state power was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Records of the Federal Convention* at 241. The Elections Clause gave "a controuling power to the Natl. legislature," *id.*, because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices," *id.* at 240. Madison observed that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power," *id.*, noting that there were many ways—including districting—that state legislative majorities might manipulate the democratic process in order to "materially affect the appointments," *id.* at 241.

In debates over the Elections Clause during state ratifying conventions, those urging the Constitution's ratification justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people's right to equal voting power." Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 210 (2010). For example, at the Massachusetts convention, Theophilus Parsons explained that the Elections Clause provided a remedy against state manipulation of the democratic process for partisan ends. "[W]hen faction and party spirit run high," Parsons warned, state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or "introduce [other] such regulations as would render the rights of the people insecure and of little value."

2 *Elliot's Debates* at 27. The Elections Clause, he argued, "provides a remedy," empowering Congress to "restore to the people their equal and sacred rights of election." *Id.*

During these debates, the Constitution's supporters often pointed to the case of South Carolina, where "South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so." *Ariz. State Legislature*, 135 S. Ct. at 2672 (citing Rakove, *supra*, at 223-24); *see* 2 *Elliot's Debates* at 51 ("The representatives, therefore, from [South Carolina], will not be chosen *by the people*, but will be representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?"); 3 *id.* at 367 ("Elections are regulated now unequally in some states, particularly South Carolina . . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.").

In short, from the very beginnings of our Constitution's history, attempts by state majorities to manipulate the electoral process have been viewed with deep suspicion. As a consequence, many provisions of the Constitution were drafted to create a republican system of government that helps "secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 Annals of Cong. 797 (1789) (Joseph Gales ed., 1834).

II. Subsequent Amendments to the Constitution Protect the Right of Individuals To Associate for Political Ends and Guarantee that All Americans Enjoy Equal Protection of the Laws, Regardless of Political Affiliation.

In 1789, the Framers added the First Amendment to the Constitution, protecting "[t]he special structural role of freedom of speech in a representative democracy." Amar, *The Bill of Rights*, *supra*, at 25. As this Court has long recognized, the First Amendment "'remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *McCutcheon*, 572 U.S. at 203 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). This reflects that "the right of electing the members of the government constitutes more particularly the essence of a free and responsible government." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 575; *see Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("[T]he system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern.").

In this respect, the First Amendment reflects our Constitution's promise of popular sovereignty: "[I]n our governments, the supreme, absolute, and

uncontrollable power *remains* in the people." 2 *Elliot's Debates* at 432; *see* Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 569 ("[I]n the United States, . . . [t]he people, not the government, possess the absolute sovereignty."). In other words, "[w]hen it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter.*, 564 U.S. at 754. As Madison put it, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). The First Amendment ensures that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 576.

The First Amendment originally constrained only the federal government, but when the Fourteenth Amendment was added to the Constitution nearly seventy years later, it required states to obey the guarantees of free speech and association secured by the First Amendment. It also guaranteed the equal protection of the laws to all persons, thereby providing protection against the possibility that persons affiliated with a disfavored political party would be subject to unequal treatment under state law. That Amendment, along with the other "constitutional Amendments adopted in the aftermath of the Civil War[,] fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution sweeping new limits on state governments. These limits were designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), to "keep[]

whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

The plain text of the Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," establishes a broad guarantee of equality for all persons, forbidding legislative majorities from discriminating against disfavored persons. *See Yick Wo*, 118 U.S. at 369 ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (the "Equal Protection Clause enforces" a "commitment to the law's neutrality where the rights of persons are at stake").

As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another," *id.* The Fourteenth Amendment "put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic," Speech of Sen. Lyman Trumbull at the Illinois Rail Road Depot, Chicago (Aug. 2, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 6, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation," Speech of Major Gen. Robert C. Schenck at Dayton, Ohio (Aug. 18, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 13.

The Fourteenth Amendment's Framers crafted a broad guarantee of equality for all persons to bring the Constitution back into line with fundamental

principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring in part and concurring in the judgment) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure." (citing 3 *Records of the Federal Convention*, at 212)). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence." Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).

Thus, the Amendment's broad wording was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose broad, universal language specifically intended to secure equal rights for *all*. Although the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Amar, *The Bill of Rights*, *supra*, at 260-61 n.*. Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benj. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867*, at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit

racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination.

The Framers wrote the Amendment's guarantees broadly because, among other things, they were concerned about state efforts in the South to single out for discrimination persons belonging to or associated with the Republican party, which had supported the Union during the Civil War and opposed efforts to reinstitute slavery. The Framers were aware of "the white South's inability to adjust to the end of slavery, the widespread mistreatment of blacks, Unionists, and Northerners, and a pervasive spirit of disloyalty." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 225 (Perennial Classics 2002 ed.); *see McDonald*, 561 U.S. at 779 (plurality opinion) (discussing the "plight of whites in the South who opposed the Black Codes"). In the South, Unionists associated with the Republican party were subject to all manner of discrimination because of their views. Debates in the 39th Congress repeatedly made the point that "[t]he courts are rebel, jurors rebel, Legislatures rebel . . . . They do not disguise their hate for Union men," Cong. Globe, 39th Cong., 1st Sess. 783 (1866), and therefore "the adoption of this Amendment" was "essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them," *id.* at 1093; *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

This sad state of affairs was documented in painstaking detail in the report of the Joint Committee on

Reconstruction, "which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment," *McDonald*, 561 U.S. at 772, and "extensively catalogued the abuses of civil rights in the former slave States," *id.* at 827 (Thomas, J., concurring). The Committee, which took the "testimony of a great number of witnesses," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), learned of a deep-seated hostility to both the newly freed slaves and their Republican allies. The witnesses the Committee spoke with confirmed that, in the South, "[t]here is . . . a feeling of great bitterness towards the [R]epublican party" and that people "look upon them with the greatest hatred, the greatest ill-will imaginable for one class of men to feel towards another." *Report of the Joint Committee*, pt. II, at 66, 208. As a result, the Committee concluded that, without federal protection, "Union men, whether of northern or southern origin, would be obliged to abandon their homes" because of animus "totally averse to the toleration of any class of people friendly to the Union, be they white or black." *Id.* at xvii; *id.* at xvii-xviii ("Southern men who adhered to the Union are bitterly hated and relentlessly persecuted."). Numerous witnesses confirmed that civil rights protections could not be enjoyed because a "loyal man" could not "get his rights in the courts" due to "prejudice," *id.* pt. II, at 97, that newly formed governments "would legislate against them in every way," *id.* pt. I, at 106, and that it was unlikely that persons "would be allowed to express openly their Union sentiments without the protection of the United States troops," *id.* pt. III, at 101. Should a Republican Unionist run for office "[h]e would have no chance at all"; "[t]hey would break up their polls and destroy their ballots." *Id.* pt. IV, at 81.

To prevent these sorts of past abuses as well as new ones that might arise in the future, the Fourteenth Amendment established equality under the law as a constitutional mandate, forbidding state majorities from using the democratic process to subject disfavored persons—whether by reason of their race, their political views, or some other form of animus—to discriminatory treatment and the loss of their fundamental rights. This sweeping guarantee of equality applies to Appellees in this case, who seek to enjoy the "right to participate in electing our political leaders," *McCutcheon*, 572 U.S. at 191, on an equal basis with all other voters in their state. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567.

There is no "redistricting" exception to these fundamental Fourteenth Amendment principles. The text of the Fourteenth Amendment's guarantee of equality "speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Moreover, the right to vote is a fundamental right, "preservative of all rights." *Yick Wo*, 118 U.S. at 370. Indeed, no right is protected by more parts of the Constitution. U.S. Const. amend. XIV, § 2; *id.* amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1; *see Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) ("The Constitution uses the words 'right to vote' in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments."). A districting plan that, in essence, "declar[es] that in general it shall be more difficult for one group of citizens"—defined by their political views—"to seek aid from the government" through the political process is "itself a denial of equal protection of the laws in the most literal

sense." *Romer*, 517 U.S. at 633; *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation' . . . we would surely conclude the Constitution had been violated.").

III. Partisan Gerrymandering that Has the Purpose and Effect of Subordinating Adherents of a Political Party and Severely Limiting the Effectiveness of Their Votes Violates the First and Fourteenth Amendments.

Three lines of this Court's precedents strongly support the proposition that extreme partisan gerrymanders that subordinate adherents of a political party and severely limit the effectiveness of their votes violate the First and Fourteenth Amendments. As these cases make clear, when a state uses "partisan classifications" in a manner that "burdens rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), and violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around,'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted), judicial relief is warranted, *see Reynolds*, 377 U.S. at 566 ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). A plan that so degrades the rights of persons belonging to or associated with a disfavored party cannot be squared with "[t]he concept of 'we the people' under the Constitution," which "visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

First, this Court's one-person, one-vote cases have held that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, . . . the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds*, 377 U.S. at 565-66. *Reynolds* held unconstitutional a state legislative districting scheme that gave disproportionate political representation to persons living in rural areas, concluding that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment." *Id.* at 566; *see Bd. of Estimate v. Morris*, 489 U.S. 688, 693-94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (*Reynolds*' rule is "designed to prevent debasement of voting power and diminution of access to elected representatives.").

Reynolds stressed equal protection principles as well as republican principles deeply rooted in the text and structure of the Constitution. "As long as ours is a representative government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. Any other result would "sanction minority control of state legislative bodies" and prevent legislatures from being "collectively responsive to the popular will." *Id.* at 565. A system that gave persons more political power based on where they lived burdened voters' representational rights, denying certain citizens "an

equally effective voice in the election of members of his state legislature." *Id.*

Second, this Court's cases have also vindicated the rights of racial minorities to participate equally in the political process by preventing at-large and multi-member districting schemes from "being used invidiously to cancel out or minimize the voting strength of racial groups." *White v. Regester*, 412 U.S. 755, 765 (1973); *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (striking down redrawing of boundaries designed to "despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights"). Drawing on *Reynolds*, this Court's cases have affirmed that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), and that plaintiffs may establish an unconstitutional burden on their representational rights by demonstrating that racial minorities "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," *White*, 412 U.S. at 766; *see Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). These cases, thus, quite explicitly protect "rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), by ensuring "that each

citizen ha[s] an equally effective voice in the election of members of his state legislature," *Reynolds*, 377 U.S. at 565.

Likewise, this Court's cases construing the results test of Section 2 of the Voting Rights Act, a statute that enforces constitutional protections, have held that states may not "dilut[e] minority voting power" by the "manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-29 (2006) (finding that redrawing of lines to reduce percentage of Latino voting age population "prevented the immediate success of the emergent Latino majority" and resulted in "a denial of opportunity in the real sense of that term"). Manipulation of district lines—whether through packing or cracking voters—can burden voters' representational rights by severely limiting the effectiveness of their votes. *See Gill*, 138 S. Ct. at 1930-31. "When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map." *Id.* at 1936 (Kagan, J., concurring). That is exactly what the evidence shows happened in these cases. *See* Br. of Appellees League of Women Voters of North Carolina, et al. ("LWV Br.") 9-14; Br. of Appellees Common Cause, et al. ("CC Br.") 8-12; Br. of Appellees Benisek, et al. ("Benisek Br.") 8-11.

Third, and finally, this Court's First Amendment cases have repeatedly struck down efforts to subordinate persons belonging to or associated with a political party disfavored by the state. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. at 356, and the "right to associate with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see Cal. Democratic Party*, 530 U.S. at 574 (recognizing that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986))). Subordinating adherents of a disfavored political party "based on disapproval of the[ir] ideas or perspectives" is "the essence of viewpoint discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment); LWV Br. 51; CC Br. 53-55; Benisek Br. 24-29.

As this Court's precedents make clear, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), because "the system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern," *Elrod*, 427 U.S. at 372. The First Amendment does not permit the state to subject to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some state-selected orthodoxy," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990), in order to "tip[] the electoral process in favor of the

incumbent party," *Elrod*, 427 U.S. at 356; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate .... The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

"[G]overnment discrimination based on the viewpoint of one's speech or one's political affiliations" is simply antithetical to the First Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (refusing to permit government to "coerce support" simply because of "dislike of the individual's political association"); *Bd. of Educ., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.").

The First Amendment analysis that applies in these cases and in others involving state regulation of the electoral process "concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). This Court's cases insist on a "pragmatic or functional assessment that accords some latitude to the States," *id.*; *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while ensuring "the right of individuals to associate for the advancement of political beliefs, and the right of

qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Under these established First Amendment principles, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. That reflects that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams*, 393 U.S. at 32. Because "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, efforts by a state to subordinate adherents of a disfavored party and severely limit the effectiveness of their votes cannot be squared with the fundamental limits enshrined in the First Amendment. The First Amendment denies the government the authority to entrench one party in power. In the electoral arena—where First Amendment protection is at its apex—"the people lose when the government is the one deciding which ideas should prevail." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018). The First Amendment prevents the government from "favor[ing] some participants in th[e democratic] process over others." *McCutcheon*, 572 U.S. at 227; *Davis v. FEC*, 554 U.S. 724, 742 (2008) ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."); LWV Br. 38-39.

It is, of course, true that "[p]olitics and political considerations are inseparable from districting and apportionment" and that "districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S. at 753. But a state does not have carte blanche to draw district lines free from

constitutional constraints. *See id.* at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); *Gomillion*, 364 U.S. at 345 (refusing to "sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions"); *cf. Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained."). The fact that the government makes political choices in districting does not carry with it a license to subordinate a group of voters and dilute their right to vote because of their political affiliation.

In sum, republican principles embedded in the Constitution's text and structure, fundamental First Amendment principles that safeguard freedom of political association, and equal protection principles that ensure equal rights under the law for all persons, regardless of their political convictions—principles deeply rooted in the Constitution's text and history and this Court's precedents—do not permit the government to use its power over the districting process to give disproportionate political power to a group of citizens based on their political association and views. This "ingrained structural inequality," *Evenwel*, 136 S. Ct. at 1123—like the malapportionment invalidated in *Reynolds* and the cases that followed it—singles out a group of citizens and dilutes and debases their right to vote in a manner manifestly inconsistent with constitutional guarantees and the system of fair and effective representation our Constitution establishes. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567. The fact that an individual belongs to one political party or another "is not a legitimate reason for . . .

diluting the efficacy of his vote." *Id.*; *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

In light of these fundamental constitutional principles, "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *Gaffney*, 412 U.S. at 752 ("It would be idle . . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). The fact that a state legislature drew district lines with political considerations in mind is the beginning, not the end, of the analysis. "The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). In other words, there must be a showing that "partisan classifications burden[] rights of fair and effective representation." *Id.* at 312. This requires a demonstration that a partisan gerrymander has the purpose and effect of subordinating adherents of a political party and severely limiting the effectiveness of their votes, conferring legislative power far in excess of votes cast at the polls. It requires showing that the partisan gerrymander unjustifiably obstructs the basic workings of representative government, "subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* at 314. These inquiries provide judicially manageable standards for separating ordinary political line drawing from unconstitutional efforts to degrade and dilute a group of voters' opportunities to

elect representatives on account of their political affiliation.

Under these standards, the extreme gerrymanders in these cases, which turn our Constitution's system of representative government on its head, cannot be squared with the First and Fourteenth Amendments. A state cannot enact into law the view that "electing Republicans is better than electing Democrats," Rucho J.A. 460, or that electing Democrats is better than electing Republicans. A state cannot use its considerable power to draw lines to nullify the fundamental principles at the core of our Constitution's system of government.

IV. The Constitution Requires Redress by the Courts When States Subordinate Adherents of a Political Party Based on Viewpoint in Violation of the First and Fourteenth Amendments.

Judicial relief is warranted here. "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 313 (2014)). Although this case, like many others, is undeniably sensitive and demands careful judgment, "this is what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Both at the Founding and following the Civil War, our Constitution's Framers insisted that constitutional limitations "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without

this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78, supra*, at 434 (Alexander Hamilton); 3 *Elliot's Debates* at 554 ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). The Framers created the Article III judiciary to "guard the Constitution and the rights of individuals from . . . designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *The Federalist No. 78, supra*, at 437 (Alexander Hamilton); *id. No. 10*, at 49 (James Madison) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

Like their counterparts at the Founding, the Framers of the Fourteenth Amendment recognized that judicial review was essential to ensure that the Amendment's constitutional protections "cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). The Framers understood that the "object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority." *Id.* "[T]he greatest safeguard of liberty and of private rights," they recognized, is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary." Cong. Globe, 41st Cong., 2d Sess. 94 (1869).

As the Constitution's text and history reflect, "[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

by the courts." *Obergefell*, 135 S. Ct. at 2605-06 (quoting *Barnette*, 319 U.S. at 638). This Court "cannot . . . ask another Branch to share [its] responsibility" to engage in judicial review of challenged state action. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

Thus, it is of no moment that the Elections Clause gives Congress the power to prescribe a remedy for partisan gerrymandering in congressional redistricting. This Court cannot delegate to Congress its constitutional role to "say what the law is" and enforce the Constitution's status as "the fundamental and paramount law of the nation." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That would permit the fundamental limits imposed by the First and Fourteenth Amendments to be "passed as pleasure." *Id.* at 178. Indeed, this Court has repeatedly refused to "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), simply because of the possibility that Congress could act under the Elections Clause. The authority granted by the Elections Clause "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian*, 479 U.S. at 217; LWV Br. 40-44; CC Br. 35-37; Benisek Br. 28. Whether or not Congress imposes regulations of its own, the Fourteenth Amendment requires states to respect First Amendment freedoms and obliges courts to intervene if they do not.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

Respectfully submitted,

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